# INDEX

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statute Involved | 2 |
| Question Presented | 2 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 9 |


## TABLE OF AUTHORITIES

**Cases:**


Bankers & c. Co. v. Atlanta Chamber of Commerce, 177 Ga. 334, 170 S.E. 291 (1933) ..... 5

Dickinson v. First National Bank in Plant City, 400 F.2d 548 (5th Cir. 1968) ..... 3, 6

First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969) ..... 3, 5, 6

Jackson v. First National Bank of Cornelia, 292 F. Supp. 156 (N.D. Ga. 1968) ..... 3, 6

Jackson v. Long, 225 Ga. 227, 167 S.E.2d 583 (1969) ..... 5


**Statutes:**


12 U.S.C. § 36 ..... 2, 5

Ga. Code § 13-204 ..... 2, 5

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1067

FIRST NATIONAL BANK OF CORNELIA, CORNELIA, GEORGIA,

*Petitioner,*

v.

W. M. JACKSON, Superintendent of Banks of the State of Georgia

and

THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, ET AL.,

*Respondents.*

**On Petition For A Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit**

## BRIEF IN OPPOSITION FOR THE SUPERINTENDENT OF BANKS OF GEORGIA

### OPINIONS BELOW

The opinion of the District Court is printed as Appendix B to the Petition. The opinion of the Court of Appeals is printed as Appendix C to the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## STATUTE INVOLVED

Contrary to what is set out in the Petition, we believe the statutory provision involved is Ga. Code § 13-204, as follows:

> "No individual, partnership, person, firm, company, or voluntary association shall carry on or conduct a banking business in this State without being chartered or certificated and organized under the banking laws of this State or of the United States."

## QUESTION PRESENTED

If a particular armored car service has been judicially determined to be a banking business, will a transfer in ownership of that service void the judicial determination if the new owner continues the exact same service?

## STATEMENT

This case originated in October, 1967, as an application by the Respondent, Superintendent of Banks of the State of Georgia (hereinafter "Superintendent") to enjoin the operation of an armored car banking service being operated by the Petitioner, First National Bank of Cornelia (hereinafter "Bank of Cornelia") in violation of the branch banking provisions of 12 U.S.C. § 36. The service operated throughout northeast Georgia and portions of western North Carolina. Fourteen (14) competing national and state banks intervened as plaintiffs on the ground that the Bank of Cornelia's operation

was illegal competition and causing them irreparable damage. The U. S. Comptroller of the Currency intervened on behalf of the Bank of Cornelia.

Following the decision by the Fifth Circuit Court in *Dickinson v. First National Bank in Plant City*, 400 F.2d 548 (5th Cir. 1968), which held that a similar service in Florida violated state banking laws, the District Court in Georgia entered an order which held the Bank of Cornelia's armored car service to be a banking service in violation of Federal and State law and enjoined its further operation. *Jackson v. First National Bank of Cornelia*, 292 F. Supp. 156 (N.D. Ga. 1968), *appeal dismissed*, February 5, 1970, Fifth Cir. C.A. No. 26938. The Florida Bank sought and was granted a writ of certiorari by this Court which subsequently affirmed the Fifth Circuit in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). The Bank of Cornelia appealed its adverse decision to the Fifth Circuit which stayed the appeal pending this Court's decision in *Plant City*. However, because Circuit Justice Black granted a stay of the District Court injunction, the Bank of Cornelia continued to operate its armored car service during this period of time.

Although this Court announced its decision in the *Plant City* case on December 9, 1969, the Bank of Cornelia continued operation of the armored car service until January 20, 1970, on the ground that the decision of this Court had not yet become a judgment. Following a denial of the Florida Bank's petition for rehearing in the *Plant City* case, the Georgia District Court reinstated its original injunction against the Bank of Cornelia's armored car service.

On the next day, the Bank of Cornelia transferred the armored car banking service operation to a subsidiary corporation which was established to operate the service. In all other respects, the service remained the same. Upon announcement of this Court's decision in *Plain City*, the owners of the Bank of Cornelia had chartered two Delaware corporations, one a holding company for the Bank and the other a subsidiary to operate the armored car banking service. When time ran out for the Bank of Cornelia, the armored car service was transferred to the subsidiary corporation.

Interestingly, it was the Bank of Cornelia which sought the sanction of the District Court for this arrangement by bringing a petition for declaratory ruling. The Comptroller of the Currency opted out from this phase of the case below and has taken no active part in the proceedings now on appeal. After a hearing on January 23, 1970, the District Court ruled that the transfer of the service still violated the banking laws and the service was being provided in direct violation of the Court's original order of October 21, 1968. The Court also found in favor of the intervenor banks' application for contempt, while deferring determination of any penalties for the contempt until a further hearing. The District Court thus ended the operation of this armored car banking service.

The Court of Appeals affirmed the judgment of the District Court. (Appendix B of Petition, page 15a).

## ARGUMENT

There is no important question of federal law involved in this case and the decision below is clearly correct.

The Superintendent refuses to be misled by the improper and irrelevant introduction into this case of the "branching" question by the Bank of Cornelia. (Bank's Petition, First Question Presented). We do not contend that the armored car banking service as now operated is a "branch" of the Bank of Cornelia within the meaning of 12 U.S.C. § 36. Neither will the Superintendent be misled by the lengthy discussion and citation of cases on the fanciful issue of whether legitimate holding companies are legal and proper in Georgia. Of course they are.

The issue in this case is whether the activities of this armored car service constitute the business of banking under the State laws of Georgia. If they do, then a national bank could not operate the service because of the restrictions in 12 U.S.C. § 36(f) as interpreted by *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). Neither could a Delaware private corporation operate this service because no one can do a banking business in Georgia without first being chartered by the proper authority either as a national bank or a state bank.[1] The statement by the Bank of Cornelia that this

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[1] Ga. Code § 13-204 provides:

"No individual, partnership, person, firm, company, or voluntary association shall carry on or conduct a banking business in this State without being chartered or certificated and organized under the banking laws of this State or of the United States." See *Jackson v. Long*, 225 Ga. 227, 167 S.E.2d 583 (1969); *Bankers & c. Co. v. Atlanta Chamber of Commerce*, 177 Ga. 334; 170 S.E.2d 291 (1933).

banking operation can be conducted in Georgia by a private Delaware corporation is simply wrong, as a matter of Georgia law. (Petition, page 15).

This Court and the Fifth Circuit Court have each decided that the operation of a similar armored car banking service by a Florida bank would be a banking service securing for the bank an unfair and illegal competitive advantage over competing national and state banks. *Dickinson v. First National Bank in Plant City*, 400 F.2d 548 (5th Cir. 1968), *aff'd*, 396 U.S. 122 (1969).

It is the law of this case that the activities of this armored car service constituted a banking business by the Bank of Cornelia. *Jackson v. First National Bank of Cornelia*, 292 F. Supp. 156, 159-160, Conclusion of Law No. 2 (N.D. Ga. 1968), *appeal dismissed*, February 5, 1970, Fifth Cir. C.A. No. 26938.

The Bank of Cornelia admits that only the ownership of the service has been changed, presumably to protect the innocent. In every other respect, the operation of the armored car banking service has remained the same. (January 23, 1970 Transcript ("T") 10; January 23, 1970 District Court order, p. 3.) Is the change in ownership sufficient, by itself, to allow the armored car banking service to continue its banking operations in violation of well established law?

The Superintendent contends that it matters not who owns the armored car service. What does matter is that the service is a banking business which has not been properly qualified as a bank. This is a matter of State law and not a proper decision for review by this Court.

No one in this case can argue that the banking func-

tions carried on by the armored car service are incidental to some other legitimate business purpose. The service was conceived with one purpose in mind, namely to further the banking interests of the Bank of Cornelia. The business of banking is its sole reason for existence. The Bank of Cornelia refuses to allow any other bank to make use of this service. (T, 4). The service is also denied to any member of the general public who is not a customer of the Bank of Cornelia. (T, 4). If the Bank of Cornelia stopped operations today, the armored car service would die a simultaneous death.

Doubtless there are cases, as the Bank of Cornelia asserts, where a court has found a particular set of facts did not constitute the business of banking. Our task is to determine whether the facts in this case justify a finding of the armored car service as a banking business.

Based on the previous judicial determination and the facts as presented by this appeal, we submit that there can be little doubt that the operation of this armored car service is a banking business.

It is quite understandable why the Bank of Cornelia has expended such a considerable amount of time, money, legal talent and effort to continue the armored car service. There is no doubt that the Bank has gained a great advantage over its competitors by this operation. However, the Bank overstates its case and the implications of this case by raising the spectre that an adverse decision will destroy the armored car industry in America. Neither the Superintendent of Banks nor the intervening banks in this case has ever implied that the present activities of a typical armored car company would run afoul of Georgia banking law. A comparison of the methods

of operation of the Cornelia armored car service as shown by this case with a typical armored car service will reveal the fallacy of this contention and we will waste no more time on this matter.

Suffice it to say that the cashing of a check by a grocery store is not a banking business and to suggest that an adverse decision will lead to this conclusion is ludicrous at best.

The effect of a decision adverse to the Bank of Cornelia would be important because it will hopefully end this armored car banking operation and return competitive equality to the banking business in northeast Georgia and western North Carolina.

The artificial attempt by the Bank of Cornelia to create a conflict between circuits cannot stand scrutiny. As we have pointed out previously, the actions of the armored car service in this case constitute a banking business. Under Georgia law, no corporation can do a banking business without being properly chartered under the banking laws of Georgia or the United States. The Bank of Cornelia does not, and indeed cannot, cite any Federal Court decision which would allow a private corporation to operate a banking business in violation of state law. In both of the cases relied on by the Bank of Cornelia, the additional banking operation had qualified under the law as a bank. As we have shown previously, it is the law of this case that the operations of this armored car service constitute a banking business, and by conducting the exact same operations, the subsidiary is operating in direct violation of Georgia law.

## CONCLUSION

In the area of banking, the State of Georgia has decided that the best road to a prosperous economy is through the encouragement and growth of local independent banking units. Especially is this so in the area described by the Bank of Cornelia as "one of the most destitute sections of the United States." The State's policy was reached after long and laborious debate and is subject to continuous modification through the legislative process. The State has a strong interest in maintaining this policy and we hope this Court will realize that this case rests on an interpretation of State law and is not the type of case envisioned as worthy of review by this Court. This armored car service is a banking business being operated in violation of State law. We respectfully urge this Court to deny the Petition for Certiorari.

Respectfully submitted,

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# BRIEF FOR RESPONDENT

## TABLE OF CONTENTS


| | Page |
|---|---|
| Argument | 1 |
| Conclusion | 6 |


### Table of Cases Cited


First National Bank in Billings v. First Bank Stock Corporation, 306 F. 2d 973 (9th Cir. 1962) ..... 5

First National Bank in Plant City, Florida v. Dickinson, 296 U. S. 122 (1969) ..... 1, 2, 3, 4, 5


### Miscellaneous Cited


12 U. S. Code, Section 36 ..... 3

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

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v.

W. M. JACKSON, Superintendent of Banks of the State of Georgia,
and
THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, et al.,
Respondents.

## RESPONDENTS' BRIEF

Petitioner, First National Bank of Cornelia, urges that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's opinion and judgment entered on September 9, 1970, the text of which is set forth as Appendix C to the petitioner's brief. Review is sought of the Fifth Circuit's ruling that operation of an armored car messenger service by a bank holding company on behalf of a bank is illegal branch banking.

Certiorari is sought because of a purported conflict in the Fifth Circuit's decision in the instant case with that of other circuits and because of a purported conflict with this Court's decision in **First National Bank in Plant City, Florida v. Dickinson,** 296 U. S. 122 (1969) (hereinafter referred to as **Plant City**). Respondents, fourteen (14)

state and national banks located in Northeast Georgia and North Carolina, strongly contend that the Fifth Circuit's decision is in complete accord with **Plant City** and that there is no conflict with other circuits on the same matter.

There is no question but that the original facts of the instant case were squarely in point with those in **Plant City**.[1] In both cases the bank owned and operated an armored car messenger service in violation of state and federal branch banking laws. Four days prior to the entry of the final judgment in **Plant City**, First National Bank of Cornelia parried with an elaborate scheme whereby ownership and operation of the armored car messenger service was turned over to a sister subsidiary of First National Bank of Cornelia's holding company. No real change of substance was made. The same trucks continued to roll over the same route using the same employees, forms, etc. The messenger service continued to operate solely on behalf of the bank, remained closed to the public and transported money only for First National Bank of Cornelia's customers,[2] free of charge.[3]

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[1] Both the Comptroller of the Currency and First National Bank of Cornelia voluntarily withdrew their appeals to the Fifth Circuit Court of Appeals following this Court's **Plant City** decision.

[2] This was stipulated by First National Bank of Cornelia at the District Court hearing on January 23, 1970. See Appendix to Petitioner's Brief, page 6a.

[3] The Fifth Circuit very cogently observed the total financial dependency of the armored car subsidiary as follows:

> "The armored car service charged the bank's customers nothing and had no visible means of financial support. Obviously it lives in the land where profit is the life blood of business by drawing fiscal sustenance from the bank, using the holding company as its artery" (p. 12a of Petitioner's Brief).

This observation is uncontroverted in the record. While petitioner's brief alludes to independent income of the holding company (p. 9), there is no evidence in the record that such is the case, and any statements to this effect should be ignored.

The thrust of petitioner's argument is that formation of a separate corporate entity through whom ownership of the armored cars is maintained removes the case from the rationale of **Plant City**. Both the District Court and the Fifth Circuit refused to be drawn into such an obviously ostrich-like stance. Judge Jones, speaking for the Fifth Circuit, responded:

> "While the incorporation of a one bank holding company and the paper transfer of the armored car service to a counterpart subsidiary corporation of that holding company might terminate the violation in strict form, it changes not a whit of the substance. Since the whole scheme of maintaining competitive equality between the national and state banking systems looks to form not substance, we affirm" (Appendix to Petitioner's Brief, page 10a).

In holding that the McFadden Act's[4] policy of maintaining competitive equality between state banks and national banks requires an examination of substance and not form, the District Court and the Fifth Circuit were assiduously following this Court's decision in **Plant City**. This Court's attitude in **Plant City** is most clearly shown in the following remarks of Chief Justice Berger:

> "Because the purpose of the statute is to maintain competitive equality, it is relevant in construing 'branch' to consider not merely the contractural rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers. Unquestionably a competitive advantage accrues to a bank that **provides** the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the

[4] 12 U. S. Code, Section 36.

relationship of debtor and creditor is established at the moment of receipt or somewhat later." 90 S. Ct. at 345. (Emphasis supplied.)

There is no question but that the Parent Messenger Service Corporation operates its armored car messenger service on behalf of the First National Bank of Cornelia. The service is not for hire, is not open to the general public and serves only First National Bank of Cornelia. (Transcript of January 23, 1970, hearing before the U. S. District Court, pp. 4, 10, 15.)

The record also amply establishes that the armored car messenger service is **provided by**, if not technically operated by, the First National Bank of Cornelia. This was the situation before the creation of the subsidiary messenger service corporation; it clearly is still so.

The situation here clearly meets the acid test of impermissible activities enunciated in **Plant City**. First National Bank of Cornelia cannot operate an armored messenger service directly. Neither can it **provide** this service for its customers indirectly through the veil of a sister corporation. In either case, the bank gains a competitive advantage over state banks which are not permitted to engage in such activities.[5]

The Fifth Circuit decision prohibiting such activities on behalf of First National Bank of Cornelia is in keeping both with the spirit and the letter of **Plant City**.

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[5] This would be in violation of Georgia Code, Section 13-204.1, which provides as follows:

"13-204.1. Banking business to be carried on only on premises of place of business.—No bank shall carry on or conduct or do a banking business in this State except on the premises of the place of business (banking house) established and operated under and pursuant to a permit from the Superintendent of Banks. A place of business for the doing of a banking business would include a parent bank, a branch bank, a bank office, or a bank facility. A banking business is the business which a bank is authorized by law to do (Acts 1967, pp. 105, 106)."

Petitioner also argues that the Fifth Circuit decision is in conflict with the decisions of other circuits, notably the District of Columbia Circuit and the Ninth Circuit. To so argue is to completely miss the point. The point is not whether the Fifth Circuit is in accord with other circuits, but whether the other circuits are in accord with this Court's **Plant City** decision. It is curious to note that every case cited by petitioner antedates **Plant City**. To the extent that these cases are in conflict with **Plant City**, it is they that must yield and not vice versa.

Still there is no need to be drawn into a tangential argument relative to a possible conflict between the instant case and the cases cited by petitioner. Supreme Court Rule 19 provides that certiorari may issue "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter * * *." The simple fact is that the cases cited by petitioner are easily distinguishable.

In each cited case branch banking was attempted to be shown through common ownership, management or control of two or more banks. As petitioner suggests the cases do stand for the proposition that, at least prior to **Plant City**, this is not illicit branch banking. The distinguishing feature is that each case involved two or more banks that were completely separate economic, functional and legal entities.[6]

Each bank met its own minimum capital requirement for banks. Each bank was economically self-sufficient.

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[6] Petitioner's argument seems to be that the armored car messenger service is permissible since it is done through a separate corporation. This approach was rejected in **First National Bank in Billings v. First Bank Stock Corporation**, 306 F. 2d 973 (9th Cir. 1962):

> "We do not agree with appellees that the fact that two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it." Id. at 942.

Each bank could have existed without regard to the continued existence of the other. Each had its own characteristic type of operation, unrelated to the other.

Compare these facts with the facts at bar. The Parent Messenger Service Corporation owes its very existence to First National Bank of Cornelia. It is a mere handmaiden with no other reason for being than First National Bank of Cornelia and the service of that bank's customers. The two are a functional and economic unit. First National of Cornelia does business through the instrumentality of Parent Messenger Service Corporation.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Fifth Circuit correctly affirmed the District Court's denial of a declaratory judgment and that the First National Bank of Cornelia may not provide an armored car messenger service as outlined by the evidence. The petition for writ of certiorari should be denied.

Respectfully submitted

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